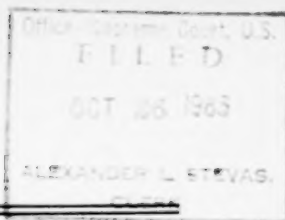


No. 83-186



In The  
**Supreme Court of the United States**  
October Term, 1983

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THE STATE OF IDAHO, on relation of MARJORIE  
RUTH MOON, State Treasurer of the State of Idaho,

*Petitioner,*

vs.

STATE BOARD OF EXAMINERS, and the Legislature  
of the State of Idaho, by and through THOMAS W. STI-  
VERS, Speaker of the House, and JAMES E. RISCH,  
President Pro-Tem of the Senate,

*Respondents.*

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**RESPONSE TO PETITION FOR WRIT OF  
CERTIORARI TO THE IDAHO SUPREME COURT**

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**RESPONSE TO PETITION FOR WRIT OF  
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**STATEMENT OF THE CASE**

Petitioner, who is the State Treasurer of Idaho, seeks review of a decision of the Idaho Supreme Court in which that court held that the Idaho Constitution was not violated by a state statute relating to the Public School Endowment Fund—a trust for the benefit of schools resulting from the Idaho Admission Act—which permitted capital gains arising from investments of the proceeds of federally donated lands to be offset against capital losses at the end of a four-year accounting period.

Petitioner had argued in the state supreme court that the legislature was required to make good any losses to

the Public School Endowment Fund without considering offsetting capital gains. *State ex rel. Moon v. State Bd. of Examiners, et al.*, 104 Idaho —, 662 P.2d 221 (1983).

Respondents agree with the procedural history of the case set forth in petitioner's statement.

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### SUMMARY OF ARGUMENT

1. The question whether federal law requires that petitioner's method of accounting for the Public School Endowment Fund, a fund resulting from the sale, lease or exchange of federally donated lands, was not decided by the Idaho state courts. The state courts decided only questions of state constitutional and statutory law. Accordingly, no federal question is properly before this Court.

2. Petitioner's theory of losses to the Public School Endowment Fund of the State of Idaho does not raise a significant federal question. The Idaho Admission Act, an act of Congress, specifies only that the trust property resulting from sales, leases or exchanges of federally donated lands be preserved for the beneficiaries of the trust. No principle of federal law prevents investment of the endowment funds or calculating investment "losses" to be only those not offset by capital gains from investments.

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## **REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI**

### **I.**

#### **No Federal Question Was Decided By the Idaho Supreme Court**

Petitioner's "Supplemental Complaint" (Petition for Certiorari, Appendix D) in the Idaho trial court alleged that the action arose under the Idaho Admission Act, the United States Constitution, and provisions of the Idaho Constitution. No specific mention of any assertedly governing federal constitutional provision was made. Instead, petitioner alleged in substance that the Public School Endowment Fund was created as a trust fund by the acts of Congress creating the Territory of Idaho, and, later, admitting the Territory to the Union as a state. She also alleged that the Idaho Constitution provided for the Public School Endowment Fund and required the legislature to protect the fund against loss. The essential feature of her complaint was the theory that (1) the trust fund was the result of a contract between the state and the United States because the fund resulted from a provision of the Idaho Admission Act, (2) it was a violation of the terms of this "contract" to balance overall gains to the fund against overall losses instead of viewing individual transaction losses as unaffected by offsetting gains to the fund resulting from investment decisions made by the trustees, and (3) the alleged method of accounting for "losses" to the Endowment Fund would violate the Admission Act and the United States Constitution unless the state Constitution and statutes were interpreted to require the leg-

islature to make up "losses" according to petitioner's method of calculating them.

Petitioner also asserted in her supplemental complaint that provisions of the Idaho Constitution required the legislature to make good all losses to the Public School Endowment Fund. She claimed that under the relevant Idaho constitutional provisions the Board of Examiners of the state had an obligation to allow her claim for losses to the fund as such might be calculated without reference to any offsetting capital gains.

The trial court granted summary judgment for petitioner on the theory that the Idaho constitutional requirement to keep the Public School Fund "inviolate and intact," IDAHO CONST. art. IX, § 3, was violated by the state statute authorizing investment losses to be offset by investment gains (Idaho Code § 57-724). (Petition, Appendix B, p. 30a). The district court ordered the Board of Examiners to present petitioner's claim to the state legislature, but held that it had no power to order the legislature to appropriate funds. (Petition, Appendix B, p. 31a).

The trial court viewed the issues presented in the summary judgment proceeding as "founded upon Idaho Constitution Art. 9, Sec. 3" (Petition, Appendix B, p. 21a), and did not purport to interpret federal legislative enactments or constitutional provisions.

Respondents, the Idaho State Board of Examiners and the state legislature, appealed the trial court's decision to the Idaho Supreme Court. The state Supreme Court restricted itself to consideration of the theory of state constitutional and statutory law announced by the

trial judge. Under Idaho law, an appeals court will consider only those questions decided in the trial court. *Oregon Shortline RR. Co. v. City of Chubbuck*, 93 Idaho 815, 474 P.2d 244 (1970); *Bogert v. Kinzer*, 93 Idaho 515, 465 P.2d 639 (1970), *appeal dismissed* 403 U.S. 914.

The state supreme court reversed the decision of the trial court. It held that the method of computing losses authorized by the state statute was not a violation of the state constitutional provision.

The result contended for by the treasurer would have us interpret the terms "capital gains" and "interest" as being synonymous. Noting that the Constitution provides the "*interest* thereon only shall be expended in the maintenance of the schools . . .," she argues that to offset capital gains and capital losses would be to in effect spend the gains other than for school purposes. However, the constitution does not specify how losses shall be computed. It does not define capital gains and interest as being synonymous terms and we decline to do so. 104 Idaho at —, 662 P.2d at 223; Petition, Appendix A, p. 6a.

The Idaho Supreme Court did not interpret or apply any federal statutory or constitutional provision. Two questions are comprised by petitioner's theory: (1) Does the state Constitution and the state's statutory scheme require the adoption of petitioner's method of computing losses to the state's Public School Endowment Fund? and (2) If state law does not require adoption of the petitioner's theory, does federal law impose such a requirement? The latter question requires an interpretation of the Idaho Admission Act, 26 Stat. 215, Ch. 656 (1890), which provides in Section 5(a) that the proceeds from the sale or lease of school lands will be assigned to the permanent



school fund, and only the interest will be expended in the support of the public schools. *Id.* Only the first of these questions was considered by the state courts.

Thus, petitioner now asks this Court to decide a question not decided by the Idaho Supreme Court, that is, whether *federal* law requires a different method of computing "losses" to the Public School Endowment Fund than that authorized by the Idaho legislature and upheld by the Idaho Supreme Court. For that reason, the petition for certiorari should be denied. This Court has held that it will not consider a federal question in cases where the highest court of a state has not decided the federal question, or the federal question was not presented in such a manner that it was necessarily decided by the action of the state court. *Street v. New York*, 394 U.S. 576 (1969). Moreover, where a state court has failed to pass upon a federal question, it will be assumed the omission was due to the want of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary. *Id.*

*See also, Bailey v. Anderson*, 326 U.S. 203 (1945); *Chicago, I, & L.R. Co. v. McGuire*, 196 U.S. 128 (1905).

A litigant's failure to present a federal question in conformance with state procedure, for which failure a state court declines to consider the federal question, constitutes an adequate state ground barring review in the United States Supreme Court. *Michigan v. Tyler*, 436 U.S. 499 (1978).

## II.

**The Underlying Federal Question Is Not Of Such  
Significance To Justify Granting The Petition  
For Certiorari.**

Apart from the circumstance that the underlying federal question was not decided by the state courts, the petitioner's theory of losses to the Public School Endowment Fund does not raise a significant federal question.

Federally donated lands, such as those defined by the Idaho Admission Act, were intended to create a trust *res* consisting of the lands and the proceeds from the sale and use of the lands. *Lassen v. Arizona*, 385 U. S. 458 (1967); *Alamo Land & Cattle Co. v. Arizona*, 424 U. S. 295 (1976). Congress intended that the earnings of the trust *res* be available for the support of the public schools, *Id.*, and, for that reason, the United States maintains a continuing interest in the administration of the trust property. *Id.*

The language of the Idaho Admission Act contemplates only that donated lands and proceeds from the sale or lease of donated lands will become part of the body of the trust. Section 4 provides that the specified lands were "granted" to the state "for the support of common schools." 26 Stat. 215, Ch. 656 (1890). Section 5 authorizes the sale or lease of the donated lands with the proceeds to go to the permanent school fund. 26 Stat. 216, Ch. 656 (1890). The state Constitution provided that the fund thus created should remain "intact" and the interest derived from it expended on the public schools. IDAHO CONST. art. IX, § 3. In short, the plain language of the relevant statutory and constitutional provisions refers only to the original proceeds from any sale or lease of

donated lands. Interest "gains" were not part of the *res*, and thus not subject to being left intact, because it was clearly contemplated by Congress that interest would be spent on the public schools. 26 Stat. 216, Ch. 656 (1890).

The cases decided by this Court are consistent with this view of the trust property. The trust is to receive *appropriate* compensation for the sale of donated lands, *Lassen v. Arizona, supra*, but it is clear that sales and leases were intended in order that a fund of money could be accumulated to earn income for the benefit of the school fund. *Alamo Land & Cattle Co. v. Arizona, supra*; *Ervien v. United States*, 251 U. S. 41 (1919).

None of this creates any inference that the method of maintaining the fund "inviolable" was to be controlled by federal law. As long as the trust *res* is not diminished, the plain terms of the Admission Act and the state Constitution are not violated and the beneficiaries of the trust are not deprived of any part of the principal of the trust. Inasmuch as the principal concern of Congress was that the beneficiaries of the trust receive "full benefit" from any sale, lease or exchange of donated lands, *Alamo Land & Cattle Co. v. Arizona, supra*, it seems plain that no principle of federal law is implicated by the state's procedure of replenishing the fund only with respect to investment losses not offset by investment gains.

Indeed, petitioner's theory would not insure that the beneficiaries of the fund receive full benefit from it. As the Idaho Supreme Court pointed out, petitioner's approach would so restrict investment decisions respecting the fund that the best possible return might not be realized:

To require the legislature to make up losses incurred on each security sale might well act to the detriment of the school children of Idaho. It would unduly restrict the Endowment Fund Investment Board.

For example, the Fund frequently holds bonds, which if held to maturity would yield a certain profit, but which if sold before maturity at a loss, and with the proceeds elsewhere reinvested, would yield a higher long range profit. This flexibility and opportunity for higher profit would likely not be exercised if the legislature would be forced to make up the loss of the sale of the bonds. 104 Idaho at —, 662 P.2d at 223; Petition, Appendix A, p. 6a.

The Idaho Supreme Court was unwilling to apply such a restrictive meaning to the relevant statutory and constitutional provisions. Moreover, respondents have found nothing in the federal law that leads to the conclusion that *preserving* the value of trust property conferred upon the state by the United States requires the court to ignore the effect on the trust property of investment gains while at the same time considering investment losses to decrease the trust *res*, thus requiring the legislature to make good the losses.

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## CONCLUSION

This Court should not grant the petition for a writ of certiorari. The federal question which petitioner seeks to raise by this proceeding was not decided in the state courts.

Moreover, questions respecting the method of accounting for the trust property do not raise an important

federal question where, as here, there is no question of reduction of the trust property.

DATED this 21 day of October, 1983.

Respectfully submitted,

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